

WESTERN STATES CONTRACTING, INC.

IBLA 90-146

Decided June 18, 1991

Appeal from a decision of the Las Vegas District Manager, Bureau of Land Management, assessing trespass damages. NV 050-4-520.

Affirmed in part; set aside and remanded in part.

1. Trespass: Generally

Where the record does not show that a trespasser lacked good faith, or acted unreasonably or irresponsibly, but demonstrates instead that he removed materials from a gravel pit on the basis of erroneous advice from a BLM official, a BLM assessment of trespass damages based on willfulness will be set aside and remanded for recalculation on the basis of innocent trespass.

APPEARANCES: Wes Adams, Western States Contracting, Inc., pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Western States Contracting, Inc. (appellant), has appealed a November 13, 1989, decision by the District Manager, Las Vegas District, Nevada, Bureau of Land Management (BLM), assessing \$165,240 as the value of materials removed in trespass from the Lone Mountain Community Pit in Clark County, Nevada.

By trespass notice NV 050-4-520, dated November 1, 1989, BLM charged appellant with a trespass in the Lone Mountain Community Pit and requested appellant to provide information necessary to effect a settlement of trespass damages.

On November 6, 1989, BLM issued a mineral appraisal report establishing the value of the materials removed. The appraisal set a value of \$1.50 per cubic yard of mineral material for innocent trespass. For willful trespass, the appraisal valued three categories of material, depending on information to be furnished by appellant, as follows: Reject sand - \$5.24 per cubic yard; Type II Material - \$4.01 per cubic yard; Non-identified Sales (sales in which appellant did not specify separate volumes of each type of material sold) - \$4.59 per cubic yard.

On November 7, 1989, appellant filed with BLM an estimate indicating that 1,800 cubic yards per week of material had been removed between June and October 1989. Appellant did not break down the volume into specific types of materials.

A BLM document entitled "Review of Western States Contracting, Inc.," dated November 13, 1989, responding to the estimate filed by appellant, asserts that in the 20 weeks between June 14 and November 1, 1989, appellant removed 1,800 cubic yards per week without the benefit of a contract. The document states in part:

This contractor does understand the contracting process that was in place during the trespass period of time. Thus, the actions taken by Western States Construction, Inc. should be considered willful.

A portion of the trespass occurred while contracts were not being issued due to the listing of the desert tortoise. Listing of the desert tortoise occurred on August 4, 1989. During the two or three weeks that followed many unanswered questions were being resolved. This included the continued operations of the community pits in general. On August 9, 1989, Mr. Wes Adams of Western States came to the office and wanted to purchase a contract. Tom Cook, Area Geologist, informed Mr. Adams that there were many unanswered questions and that he could continue operations. Mr. Adams was informed that we should know within a couple of weeks what we would be doing.

Mr. Adams did not check back and elected to continue to operate until the trespass notice was issued to him on November 1, 1989.

In the appraisal document, the "value of the material taken under willful trespass" was calculated as follows: 20 weeks x 1,800 cubic yards per week x \$4.59 per cubic yard = \$165,240.

In his November 13, 1989, decision, BLM's District Manager found appellant to be in violation of sections 302 and 310 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1732, 1740 (1988), and 43 CFR 9239.0-7, which provide:

The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

The District Manager found the trespass to be willful because appellant operated without the benefit of a contract though he had knowledge of the "permitting process." He assessed appellant the previously calculated amount of \$165,240.

In his statement of reasons on appeal, appellant mentions visiting with BLM's geologist Tom Cook. Appellant states, "Tom told me to keep operating because the BLM had no answers to any questions." Appellant also asserts

that BLM's valuation of \$4.59 for "pit run" material is excessive by \$3. Appellant alleges that he has letters from materials suppliers supporting lower costs, but has furnished no such documentation. Appellant refers to a "meeting with Runore" at which appellant "proposed that you charge us the additional fee from the time our permit expired and the \$1.25 per cubic yard, from the time of the meeting with Tom Cook till the time the permit was issued."

Appellant does not deny that its contract expired on June 14, 1989, and that for the following 20-week period ending November 1, 1989, appellant was in trespass and removed an estimated 36,000 cubic yards of mineral materials without a contract. Nor does appellant deny that it was in willful trespass from the date its contract expired on June 14 to the date of the meeting with Cook on August 9. Thus, the sole issue on appeal is whether BLM's assessment of damages for willful trespass for the period August 9 to November 1 was proper.

[1] BLM found appellant's trespass willful for the period at issue on the basis that appellant removed materials from the pit without a permit even though appellant had knowledge of the permitting procedure. Under the circumstances demonstrated by this record we cannot endorse the finding of willfulness. The undisputed facts are that appellant went to BLM to seek a permit, was told that permits were not being issued for a time indefinite, and was told "that he could continue operations." Willfulness is demonstrated by conduct which negates the conclusion that a trespasser acted in good faith or innocent mistake. Willfulness may also be shown by conduct so lacking in reasonableness or responsibility that it became reckless or negligent. See Herrera v. Bureau of Land Management, 38 IBLA 262, 267 (1978); Eldon Brinkerhoff, 24 IBLA 324, 337, 83 I.D. 185, 190 (1976). Since the file before us contains no documentary evidence of the permitting practice between appellant and BLM, we are unable to determine whether appellant's knowledge of such practice would tend to support a conclusion of willfulness. This gap in the evidence, coupled with BLM's erroneous advice to appellant to "continue operations" militate against the notion that appellant acted unreasonably or irresponsibly. See Curtis Sand & Gravel Co., 95 IBLA 144, 161-63, 94 I.D. 1, 11-12 (1987). We note here that obviously appellant could gain no rights not authorized by law by heeding the erroneous advice of a BLM official. See Parker v. United States, 461 F.2d 806 (Ct. Cl. 1972); Magness Petroleum Corp., 113 IBLA 214 (1990). However, our conclusion that the record herein does not support a finding of willful trespass is not inconsistent with this well-established principle, and accords appellant nothing not authorized by law.

We therefore conclude that BLM's November 13, 1989, decision should be set aside and the case remanded for recalculation of damages so that appellant is assessed damages for innocent trespass for the period August 9 to November 1, 1989.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

from is affirmed in part, set aside in part, and the case is remanded for action consistent with this opinion.

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John H. Kelly  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

